

No. 12512

United States
Court of Appeals
for the Ninth Circuit.

ALASKA INDUSTRIAL BOARD and ALFRED
J. PETERSON,

Appellants,

vs.

ALASKA PACKERS ASSOCIATION,

Appellee.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
Division Number One.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Juneau, Alaska,
For Appellee.

In The District Court for the Territory of Alaska
Division Number One at Juneau

No. 6084-A

ALASKA PACKERS ASSOCIATION,
Plaintiff,
vs.

ALASKA INDUSTRIAL BOARD, Composed of
HENRY BENSON, Chairman; GERALD
WILLIAMS, Attorney General of the Terri-
tory of Alaska, and FRANK BOYLE, Auditor
of Alaska, and ALFRED J. PETERSON,
Defendants.

COMPLAINT AND APPEAL FROM AN
AWARD OF ALASKA INDUSTRIAL
BOARD UNDER THE "WORKMEN'S
COMPENSATION ACT OF ALASKA"

Comes now the plaintiff and respectfully appeals to the District Court for the Territory of Alaska, First Judicial Division, from that certain award, hereinafter mentioned, of the Alaska Industrial Board, and complains and alleges as follows:

I.

That plaintiff is a corporation organized under the laws of the State of California, and existing under said laws, and that during all times hereinafter mentioned it was and now is engaged in the fishing industry in the Territory of Alaska, and is authorized to do business in the Territory of Alaska.

II.

The plaintiff has paid unto the Territory of Alaska its annual corporation tax last due, and has complied with all the laws of said Territory which are prerequisite to its bringing actions in the District Courts of Alaska.

III.

That the defendant, Alfred J. Peterson, was employed by the plaintiff as a deck hand. He was originally so employed as such a deck hand aboard the vessel "Brant," which departed from Blaine, Washington, for Alaskan fishing waters in April, 1947. On June 19, 1947, he was transferred as a deck hand to the M/V "Rail." Said vessels were at all times operated in navigable waters of the United States, and the defendant Alfred J. Peterson had no duties to perform ashore, and at no time did he perform any work ashore. While so [1*] employed aboard the M/V "Rail," the defendant Alfred J. Peterson alleges he was injured on July 10, 1947, while carrying a sack of coal on the deck of said vessel. The sack of coal which said defendant alleges he was carrying when he sustained his alleged injury was for use in the galley stove of said vessel.

IV.

On September 24, 1948, the said Alfred J. Peterson filed an application for adjustment of claim with the defendant Alaska Industrial Board.

V.

A hearing before the full membership of the

* Page numbering appearing at bottom of page of original Reporter's Transcript.

Alaska Industrial Board was held in Juneau, Alaska, on February 5, 1949. At said hearing, the defendant, Alfred J. Peterson, was represented by his attorney, Henry Roden, and the plaintiff was represented by Robert Boochever of his attorneys, Faulkner, Banfield & Boochever. No oral evidence was adduced at said hearing, and the only evidence presented to the Board was that of affidavits and other documentary evidence. From said evidence the Alaska Industrial Board found the facts to be as stated in the Board Decision and Award dated March 31, 1949, and attached hereto as Exhibit A.

VI.

In the finding of facts included in the said decision and award, there is stated on page 2 as follows:

“Applicant was totally disabled from doing work as a laborer, the only type of work he was qualified to do, until January 1, 1948, aggregating 144 days of such temporary disability immediately following August 9, 1947,”

although there was no evidence presented to the Board upon which such a finding of fact could properly be made to the effect that applicant was totally disabled from doing work as a laborer for such a period of time.

VII.

In the finding of facts included in the said decision and award, there is stated on page 2 as follows:

“That applicant is subjected to a permanent partial disability as follows: 50% as compared

to the maximum for a [2] spinal injury, which fairly reflects the percentage of the loss of his earning power,"

although there was no competent evidence presented to the Board upon which such a finding of fact could properly be made to the effect that applicant suffered such a loss of such a percentage of his earning power.

VIII.

Said decision and award was made, although the plaintiff herein objected to the jurisdiction of the Alaska Industrial Board in regard to this case; and although the Board did not place the burden on the said Alfred J. Peterson to show that his alleged injury came within the Act as provided by Section 43, Chapter 3, of the Alaska Compiled Laws Annotated, 1949, and awarded him compensation, although the Alaska Industrial Board had no jurisdiction over this case, and awarded him temporary disability compensation for the period from August 9, 1947, to January 1, 1948, although he failed to prove that he was temporarily disabled for such a period of time, and awarded him permanent partial disability of 50% of the amount payable to him for total and permanent disability, although he failed to prove that he suffered such a degree of permanent partial disability.

IX.

Said decision and award included in addition to the other sums there allowed, an award of \$750.00 as the fee for the said Alfred J. Peterson's attor-

ney, although under the provisions of Section 43, Chapter 3, A.C.L.A. 1949, attorney's fees are not to be granted in addition to other sums awarded, but are to be paid out of the award, and said payments are to acquit the employer for an equal portion of the award, and although such an award as attorney's fees is excessive.

X.

The plaintiff will be substantially damaged unless the payment of the amount required by such award be stayed pending final decision by this Court, because the said Alfred J. Peterson is not a resident of the Territory of Alaska, and inquiries of the plaintiff have failed to reveal that the said Alfred J. Peterson owns any property in the Territory of Alaska which is subject [3] to execution, and therefore plaintiff believes and alleges that the said Alfred J. Peterson owns no such property in the Territory of Alaska, and has no financial resources from which the plaintiff could secure the repayment of any sums paid by it under said award; that plaintiff's refusal to pay said award would subject it to be charged with having committed a misdemeanor, and upon conviction thereof to pay a fine of not less than \$50.00 or more than \$500.00, and that the said Alfred J. Peterson will suffer no injury or damage by being made to await the decision of this Court; that there are attached hereto certificates from the City Clerk of the City of Juneau, Alaska, and the Recorder of the U. S. Commissioner's office at Juneau, Alaska, showing that no property is owned

by the said Alfred J. Peterson in the Juneau Precinct of the Territory of Alaska and said certificates are marked respectively Exhibit B and Exhibit C.

Wherefore plaintiff respectfully appeals to the District Court of the Territory of Alaska for Division Number One, from said decision and award made by the Alaska Industrial Board on March 31, 1949, and prays for an order staying, pending final decision in this proceeding, the payment of the amounts required by said decision and award, and that an interlocutory injunction be granted herein enjoining the defendant Alaska Industrial Board and its members, namely, Henry Benson, Chairman; Gerald Williams, Attorney General of the Territory of Alaska, and Frank Boyle, Auditor of Alaska, as well as the said Alfred J. Peterson from in any manner attempting to enforce, pending final decision in this proceeding, the payment of said amounts by the plaintiff, and that upon final hearing herein said decision and award of the Alaska Industrial Board may be entirely suspended and set aside, and for such other and further relief as may be meet and equitable in the premises.

FAULKNER, BANFIELD &
BOOCHEVER,

Attorneys for Plaintiff.

By R. BOOCHEVER. [4]

United States of America,
Territory of Alaska—ss.

R. Boochever, being first duly sworn on oath according to law, deposes and says: that he is attorney for Alaska Packers Association, a corporation organized under the laws of the State of California; that there are no officers or agents of said corporation at the place where this verification is made; that R. Boochever is authorized to verify the foregoing complaint on behalf of said corporation; that he has read said complaint, knows the contents thereof, and that the facts stated therein are true and correct as he verily believes.

/s/ R. BOOCHEVER.

Subscribed and sworn to before me this 29th day of April, 1949.

[Seal] /s/ LOIS P. ESTEPP,
Deputy Clerk of the District Court, Territory of
Alaska, Division No. 1. [5]

Alaska Industrial Board
Juneau, Alaska

In the matter of the Application of
ALFRED PETERSON,
Applicant
vs.

ALASKA PACKERS ASSOCIATION, a Cor-
poration,
Defendant.

BOARD DECISION AND AWARD

Pursuant to application of the above-named claimant, and hearing before the full Board, at which both parties were represented by counsel, the Board heard evidence and considered the case on the merits, and finds the facts to be as follows:

That during the 1947 fishing season, the applicant was employed by the defendant as a deck hand on one of its "monkey boats" used and operated in connection with its canning operations at Naknek, Alaska.

That on June 10, 1947, while employed as afore-said, applicant was required to carry a sack of coal, weighing two hundred pounds, from the bow to the stern of said boat; that upon depositing said sack of coal, he felt a sharp pain in his back, which pain radiated through his legs. Although applicant was kept on inactive status because of said back injury,

he remained at Naknek until August 9th at the end of canning operations, and was flown to Seattle, Washington. He received full wages from said employer up to and including August 9, 1947. He then received free medical care and hospitalization for his back at the Marine Hospital.

That applicant's daily average wage was \$16.12, of which 65% is \$10.54, his daily rate of temporary disability compensation.

Applicant was totally disabled from doing work as a laborer, the only type of work he was qualified to do, until January 1, 1948, aggregating 144 days of such temporary disability immediately following August 9, 1947.

That applicant is subjected to a permanent partial disability as follows: 50% as compared to the maximum for a spinal injury, which fairly reflects the percentage of his loss of earning power. [6]

That at the time of the accident applicant had one child under 18, dependent upon him.

That at said time defendant had in its employ more than three persons.

From the foregoing findings of fact, the Board makes the following conclusions of law:

That the Board has jurisdiction in this case.

That at the time of the injury, an employer-employee relationship existed between the parties.

That the injury to applicant's back was an accident arising out of and in the course of his said employment.

That said accident caused the disability above specified.

That applicant is entitled to an award for temporary total disability and permanent partial disability on the basis of the above findings and in accordance with the provisions of the Alaska Workmen's Compensation Act, Sec. 43-3-1 ACLA 1949.

It Is Ordered that applicant, Alfred Peterson, is granted and hereby awarded against the defendant the sum of \$1,517.76 as temporary disability compensation, with interest at the rate of 8% per annum from dates that compensation payments thereon were due, until paid, together with \$3,450.00 representing 50% of the amount that would be payable to him for total and permanent disability; together with his attorney's fee in the sum of \$750.00 which fee is hereby fixed at said amount.

Dated at Juneau, Alaska, March 31, 1949.

ALASKA INDUSTRIAL
BOARD.

By /s/ HENRY A. BENSON,
Chairman.

/s/ RALPH J. RIVERS,
Member.

/s/ FRANK A. BOYLE,
Member.

United States of America,
Territory of Alaska—ss.

I Hereby Certify that the foregoing is a full, true and correct copy of the original Board Decision and Award herein, dated March 31, 1949.

/s/ HENRY A. BENSON,
Chairman, Alaska Industrial
Board.

[Endorsed]: Filed April 29, 1949. [7]

In the District Court for the Territory of Alaska
Division Number One, at Juneau
No. 6084-A

ALASKA PACKERS ASSOCIATION,
Plaintiff,
vs.

ALASKA INDUSTRIAL BOARD, and ALFRED
J. PETERSON,
Defendants.

ANSWER OF ALFRED J. PETERSON

Answering plaintiff's complaint on file in this cause, the defendant Alfred J. Peterson denies and alleges as follows, to wit:

1.

Denies the allegations, matters and things set forth in paragraphs six and seven of said complaint

to the effect that no substantial evidence was submitted to the Industrial Board upon which to base the findings in said paragraphs set forth.

2.

Answering paragraph eight of said complaint this defendant denies that said Board lacked jurisdiction to hear and adjudge said cause and denies that he failed to prove that he sustained temporary and permanent disabilities.

3.

Answering paragraph nine of said complaint this answering defendant denies that attorney's fees may not be awarded under said Workmen's Compensation Act and denies that \$750.00 is an excessive fee to allow his attorney for compensation for services rendered herein and to be rendered.

Further answering said complaint, this defendant alleges as follows, to wit:

1.

That during the fishing season of 1947 this defendant was employed by plaintiff, Alaska Packers Association, as a fisherman under the terms and provisions of a contract, commonly known as the "Alaska Fishermen's Bristol Bay Supplementary Agreement"; that at all times herein mentioned this defendant was a member of said Union. [8]

2.

Upon arriving at plaintiff's cannery plant at Naknek, defendant was assigned to serve on the

monkey boat "Rail," which is a wooden vessel of nine net tons, about 45 feet long; said monkey boat was the property of plaintiff and during said season was engaged in towing plaintiff's unpowered fishing boats to the fishing grounds and in returning them, with their catch, to said cannery where said fish were processed and canned; such towing service was rendered solely to plaintiff's fishing boats; that said towing is incidental to the processing and canning of fish and is of purely local character in that said fish are caught and transported within the confines of Bristol Bay and within a few miles of where they are processed and canned; that all fish thus caught, transported and canned is the property of the plaintiff from the time same are caught and said catching and transporting is done at a compensation per fish, agreed upon between plaintiff and its fishermen, including this defendant, at the commencement of the fishing season, each year.

3.

That while employed as aforesaid on the 10th day of July, 1947, this defendant, by accident, suffered an injury in this: that at said time it was his duty to move a heavy sack of coal from one part of said boat to another; in carrying said sack of coal he wrenched his back, causing him to suffer temporary disability up to the time of the hearing of his application for compensation by the Industrial Board, and further on account of said accident he sustained permanent partial disability, causing him the loss of fifty per cent of his earning capacity.

That at said time this defendant was a widower and had one child under eighteen years, dependent upon him.

Wherefore this defendant prays that plaintiff's complaint herein filed be dismissed and the award of the Alaska Industrial Commission in the premises be affirmed and that he recover his costs and disbursements herein.

/s/ HENRY RODEN,

Attorney for Defendant
Peterson. [9]

United States of America,
Territory of Alaska—ss.

Henry Roden, being first duly sworn, on oath deposes and says: I am the attorney for the defendant Alfred J. Peterson and make this verification on his behalf; the same is not made by said defendant person is because he is not now at Juneau, Alaska, where same is made; I have read the foregoing answer, know the contents thereof and that the same is true as I verily believe.

/s/ HENRY RODEN.

Subscribed and sworn to before me this 18th day of June, 1949.

[Seal] /s/ LOIS P. ESTEPP,
Deputy Clerk of District Court, Territory of
Alaska, Division No. 1.

[Endorsed]: Filed June 21, 1949. [10]

In the District Court for the Territory of Alaska
Division Number One at Juneau

No. 6084-A

ALASKA PACKERS ASSOCIATION,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
HENRY BENSON, Chairman; GERALD
WILLIAMS, Attorney General of the Ter-
ritory of Alaska, and FRANK BOYLE, Au-
ditor of Alaska, and ALFRED J. PETERSON,

Defendant.

OPINION

The questions presented by this proceeding to set aside the award of the Alaska Industrial Board to the defendant Peterson are:

(1) Whether the case falls within the admiralty jurisdiction, and (2) Whether the findings of the Board that total disability continued from the date of his injury to January 1, 1948, and that the injury resulted in a 50% permanent disability is supported by any substantial evidence.

Plaintiff is engaged in operating a salmon cannery at Naknek, Bristol Bay, Alaska. Peterson was employed by plaintiff on April 28, 1947, at Blaine, Washington, as a deck hand on the vessel Brant, subject to the terms and conditions of the Alaska Fishermen's Union Bristol Bay Supplemental Agreement, and upon the arrival of the vessel at Naknek, was transferred to the vessel Rail, a boat of 9 tons net which was used by the plaintiff for the purpose of towing fishing boats to and from the scows which received the catches, as well as towing the scows themselves. On July 10, while depositing a sack of coal on the galley floor, which he had carried from the bow to the stern of the Rail and which was to be used in the galley stove, Peterson sustained a back strain and discontinued working on July 23rd. On March 31, 1949, the Board awarded him \$1517.76 for temporary disability to January 1, 1949, and \$3450 for 50% permanent disability. [11]

Whether the case falls within the jurisdiction of admiralty over which the judicial power of the United States was extended by Article III, Section 2, of the Constitution, or within the local jurisdiction, is the crucial question.

Under the general maritime law, a seaman is entitled to the remedies of maintenance and cure and to damages for injury or death for failure of the shipowner to furnish a seaworthy vessel or safe and proper appliances. Under the Jones Act, 46 USCA

688, enlarging his rights, the seaman is entitled to damages for injury or death sustained in the course of his employment as a result of negligence. Under the Longshoremen and Harbor Workers Act, 33 USCA 901, et seq., stevedores, longshoremen and casual workers engaged in maritime employment, compensation for whom cannot validly be provided by local law, are likewise entitled to compensation for injuries or death sustained in the course of their employment. Masters and members of crew are excluded from the latter act. For those not falling within these categories, the state may validly provide compensation.

Great difficulty has been encountered, however, in determining the line of demarcation between federal and local authority. The test originally laid down in *Southern Pacific v. Jensen*, 244 U. S. 205, where the Court held that the case of the appellee killed while engaged in unloading a ship as a stevedore, fell within the admiralty jurisdiction is, page 216, that:

“No legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”

Despite criticism of the constitutional basis of the *Jensen* decision, the doctrine of that case has never

been repudiated, although its application has been somewhat limited by the development of the "maritime but local" and twilight zone concepts exemplified in *Miller's Indemnity v. Braud*, 270 U. S. 59, and *Davis v. Department of Labor*, 317 U. S. 249. In the light of later decisions, the rule appears to be that stated in *LaCasse v. Great Lakes Engineering Works*, 242 Mich. 454, 219 N. W. 730, in the following language:

"If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of admiralty unless (a) the contract is of merely local concern; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the [12] general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' 4. State Workmen's Compensation Laws . . . are applicable to maritime service on navigable waters, when, and only when, the service is within exceptions (a), (b) and (c) above."

Notwithstanding, the difficulty of determining whether a particular case falls within the federal or local domain has not been obviated. See "A Decade of Admiralty in the Supreme Court of the United States," 36 *California Law Review* 169. And as

late as the Davis case, page 253, 255-6, the Court said:

“This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must be determined in view of surrounding circumstances as cases arise. * * * The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here.”

* * * “The line separating the scope of the two, being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side.”

* * * “There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements.”

It is not disputed that Peterson was a seaman and that he was engaged as such in navigable waters of the United States when injured. Plaintiff contends that these facts alone bring the case within the exclusive jurisdiction of admiralty, while the defendant contends that the case falls within the “maritime but local” exception to the Jensen doctrine, and that, in any event, it falls within the twilight zone concept of the Davis case, *supra*.

The basis of the "Maritime but local" exception appears to be that where the activity is a mere matter of local concern, the application of local law would not work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of the law in its international and interstate relation. *Washington v. Dawson*, 264 U. S. 219, 227; *Great Lakes v. Kierejewski*, 261 U. S. 479-481; *Employers' Liability Assurance Corporation v. Cook*, 281 U. S. 233. And if the place or character of the employment or the use made of the vessel at the time of the employment is of such an equivocal or indeterminate character that the case could as logically be held to fall on one side of the dividing line between federal and local authority as on the other, recovery could, under the twilight zone concept of the *Davis* case, be had under either federal or local law. [13]

Illustrative of the scope and nature of the "maritime but local" exception, is *Alaska Packers Association v. Marshall*, (9th Cir.) Fed. (2) 279, involving the same locale, but somewhat different facts. There the decedent, with another, operated the usual fishing vessel and delivered his catch to the cannery. He also had shore duty to perform. Here the claimant was a deck hand aboard a tug which was employed in towing fishing vessels to and from the grounds and the scows to and from the cannery. It could be argued, therefore, that in this case, as well as in the *Marshall* case, the dominant activity

was the operation of the cannery and the processing of the fish and that the navigation of the Rail was merely incidental thereto. But in *Olsen v. Alaska Packers Association*, 114 Fed. (2) 364, the same Court refused to extend the scope of the Marshall decision and, hence, it could be said that these two decisions roughly mark the boundaries of the "maritime but local" exception so far as fishing in Bristol Bay is concerned, were it not for *Parker v. Motor Boat Sales*, 314 U. S. 244, and *Davis v. Department of Labor*, 317 U. S. 249. In the former an award under the Longshoremen and Harbor Workers Act, for the death of a janitor and handy man drowned while assisting a fellow employee in demonstrating an outboard motor, was upheld as against the view of the Court of Appeals that the activity in which the deceased was engaged at the time of his death was not only casual but also local in character. Although considerable weight was given to the findings and conclusions of the commissioner who made the award, it appears that the controlling consideration was the circumstance that the accident occurred on navigable waters. In *Davis v. Department of Labor*, 317 U. S. 249, the employer was engaged in dismantling a bridge, in connection with which a tug, a derrick barge and a barge were used. As steel was cut from the bridge, it was lowered to the barge for ultimate towage to a place of storage. The decedent had helped to cut steel from the bridge and was examining the pieces of steel on the barge for the purpose of cutting it further if necessary and, while so en-

gaged, was knocked from the barge and drowned. An award made under the local compensation act was held by the state court to be in conflict with the federal law. The Supreme Court, however, reversed. After commenting on the difficulty encountered in determining the scope of the "maritime but local" exception, the Court rested its decision on the presumption of constitutionality of the state law. Obviously before this presumption could be invoked in the instant case, it would have to appear that the case fell within the marginal area on either side of the [14] dividing line between federal and state authority termed the twilight zone.

Since the twilight zone concept is intended to embrace cases which defy ready classification, it would seem immaterial whether the doubt as to classification arises from the nature of the activity or from the fact that it has both maritime and non-maritime features or from any other cause and that henceforth all cases of doubt would be covered by the twilight zone concept. If this be the correct view, then it would seem that "maritime but local" exception has been swallowed by the twilight zone doctrine and that from now on the exception will serve no useful purpose save that of identifying the factor that gives the case its marginal character. It would, therefore, appear to be unnecessary to determine the limits of the "maritime but local" exception in disposing of the instant case.

Since it is undisputed that claimant was a seaman and that the injury occurred while he was engaged

as such on navigable waters, it is clear that his case is not of the twilight zone character unless the activity in which he was engaged could be said to be one of mere local concern so as to make it doubtful into which domain the case falls. It should be noted that in the Davis case the employment was of an amphibious character and it was undoubtedly its maritime and non-maritime features which suggested the twilight zone concept as a means of escaping the consequences of conflict in attempting a jurisdictional classification of marginal cases. Where a case is of that character it can hardly be said that the assertion of local jurisdiction would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international or interstate relations. It would, therefore, appear that where, because of the facts and circumstances, it is difficult to determine either whether maritime employment is local in character or whether the employee is a maritime or shore worker, the case would be of the twilight variety.

The question then is whether this is the kind of case that falls within the marginal area resulting from the blending of federal and state jurisdictions. Where, as has been recently observed, the injury is sustained by a seaman on navigable waters, the only possible factor which could bring the case within the twilight zone doctrine is the doubtful character of work in which the vessel was engaged. The Marshall case, *supra*, is not only distinguishable

from the instant [15] case on the facts, but it would appear that it must be deemed to be overruled, at least in part by *Parker v. Motor Boat Sales*, *supra*, and the *Davis* case. In *Gahagan Construction Corporation v. Armao*, (1st Cir.) 165 Fed. (2) 301, 304, the Court pointed out that:

“In no case in the Supreme Court in which the injured person was a seaman performing a seaman’s duties on navigable water has state law been held applicable. Even those members of the Supreme Court who customarily dissented in the application of the *Jensen* rule, concurred in holding state acts inapplicable where the injured person was a seaman covered by the *Jones Act*,”

and concluded, page 305, that, where a seaman is injured on navigable waters, there is no place for the application of the doctrine of local concern. However, the case that would appear to dispose of the question whether the activity in which the *Rail* was engaged in the instant case, was a matter of merely local concern, is that of *London Company v. Industrial Commission*, 279 U. S. 109, where it was held that compensation for the death of a seaman employed in connection with the operation within a radius of 5 miles, in state waters, of a fleet of small fishing boats for hire for deep sea fishing was within the jurisdiction of admiralty. In the course of its opinion, the Court said, pages 123 and 125:

“There was no feature of the business and employment that was not purely maritime. To

hold that a seaman, engaged and injured in an employment purely of admiralty cognizance, could be required to change the nature of conditions of his recovery under a state compensation law, would certainly be prejudicial to the characteristic features of the general maritime law.

“The conclusion sought to be drawn by counsel for the commission from the Rohde and other cases is that workmen’s compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and that there is neither here. But this omits one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the U. S. which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features. We must hold, therefore, that it was a violation of the exclusive maritime jurisdiction conferred by the Constitution to apply in this case the California Compensation Act.”

Undoubtedly, one of the essential elements of local jurisdiction is that the employment must be one that has no direct effect on navigation or commerce. It

is well established that the loading and repairing of a ship have a direct effect on commerce and navigation. In this connection, it should be noted that such employment is but one step removed from navigation and commerce. Here, however, the employment does not depend on such a relation. It is of [16] the very essence of navigation and commerce, and, moreover, Peterson was a seaman in the traditional sense. Where the employment is of that character, it is not a matter of mere local concern and the jurisdiction of admiralty is exclusive. If further support were needed, for this conclusion, it may be found in the highly significant fact that in no case in which a seaman, who was also a member of the crew, was injured on navigable waters of the United States, has it been held that local law applies.

It is my opinion, therefore, that the Board erred in concluding that the instant case fell within the local jurisdiction and that the award should be set aside.

GEORGE W. FOLTA,
District Judge. [17]

[Endorsed]: Filed January 25, 1950.

In the District Court for the Territory of Alaska
Division Number One at Juneau

No. 6084-A

ALASKA PACKERS ASSOCIATION,
Plaintiff,
vs.

ALASKA INDUSTRIAL BOARD, Composed of
HENRY BENSON, Chairman; GERALD
WILLIAMS, Attorney General of the Ter-
ritory of Alaska, and FRANK BOYLE, Au-
ditor of Alaska, and ALFRED J. PETERSON,
Defendant.

FINAL JUDGMENT

This matter coming on to be heard before the Court without a jury on December 27, 1949, the plaintiff being represented by R. Boochever of Faulkner, Banfield & Boochever, its attorneys; the defendant, Alaska Industrial Board, being represented by John Dimond, Assistant Attorney General, who did not participate in the proceedings; and the defendant, Alfred J. Peterson, being represented by Henry Roden of his attorneys; arguments having been heard and the Court having filed its written Opinion on January 25, 1950, holding that the Alaska Industrial Board did not have jurisdiction of this claim and that the matter fell within the realm of exclusive admiralty jurisdiction and holding further that the Decision and Award rendered

by the defendant, Alaska Industrial Board, on March 31, 1949, awarding compensation to the defendant, Alfred J. Peterson, in the sum of \$1517.76 for temporary disability to January 1, 1949, and \$3450.00 for 50% permanent disability, should be set aside.

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that that certain Decision and Award of the Alaska Industrial Board heretofore entered in the above-entitled matter on March 31, 1949, be and the same is hereby set aside, and the Alaska Industrial Board, composed of Henry Benson, Chairman; J. Gerald Williams, Attorney General of the Territory of Alaska, and Frank Boyle, Auditor of Alaska, and Alfred J. Peterson, defendants, be and the same are permanently enjoined from in any manner attempting to enforce said Decision and Award of the Alaska Industrial Board. [18]

Done in open Court this 26th day of January, 1950.

GEORGE W. FOLTA,
District Judge.

Receipt of copy.

[Endorsed]: Filed and entered January 26, 1950.

P. O. Box 2141
Juneau

Alaska Workmen's Compensation Act

Territory of Alaska

APPLICATION FOR ADJUSTMENT
OF CLAIM

Alaska Industrial Board

ALFRED PETERSON,

Applicant,

vs.

ALASKA PACKERS ASSOCIATION,

Defendant.

No.

Applicant's Address: Box 410, Rt. 2, Poulsbo,
Washington.

Defendant's Address: Bell Street Terminal,
Seattle, Washington.

1. Alfred Peterson, age:, while employed as deck hand, on July 10, 1947, at Naknek, Alaska, by Alaska Packers Association, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Carrying coal weighing 200 pounds, wrenched and sprained my back resulting in injury to low back and referred pain down right leg ruptured intervertebral disc.

2. Injured left work on July 23, 1947, and disability continued to present.

3. Last payment of indemnity on none; Last medical furnished by employer on about July 29, 1947. Notice of Injury given employer on July 10, 1947.

4. Medical and surgical treatment has been rendered by Marine Hospital, Seattle, Wash., Dr. D. E. McArthur, Dr. Lowell Williams and Dr. Harry Leavitt, all of Seattle, Washington.

5. Employee's wages were \$16.28 per day, working 12 hours per day 6 days per week plus board and room valued at \$30.00 per month. Earnings from 5-1-47 to 8-9-47, \$1,628.10.

6. Total compensation paid to date, none.

7. Injured was divorced, and had two dependents, as follows: Jerome Bryan Peterson, son, age six years, Valborg Peterson, mother.

* * *

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this claim is: to obtain compensation from August 9, 1947, to the present time, together with medical treatment.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Seattle, Washington, September 24, 1948.

/s/ ALFRED PETERSON,
Signature of Applicant.

/s/ ROY E. JACKSON,
Agent or Attorney for Applicant if applicant represented.

Note:—Either party to the dispute may apply to the Board for adjustment of any matter in difference. The original application and two copies for the defendant must be mailed to Board at Juneau, Alaska. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by agent or by attorney.

Note:—Time and Place of Hearing Endorsed on Back Hereof. [20]

Territory of Alaska
Alaska Industrial Board
Claim No. AIB 8-3-141

ALFRED J. PETERSON,
Applicant,
vs.

ALASKA PACKERS ASSOCIATION,
Defendant.

NOTICE OF HEARING OF APPLICATION FOR ADJUSTMENT OF CLAIM

You are hereby notified that an application to adjust a claim for compensation (As shown on the

reverse hereof) has been filed in the office of the Alaska Industrial Board at Juneau, Alaska.

You are further notified that said application has been set for hearing at Juneau, Alaska, Monday, November 8, 1948; Room 16, Valentine Building, and that at said time and place the Alaska Industrial Board will proceed to hear and dispose of the said application in the manner prescribed by law.

Dated at Juneau, Alaska, October 19th, 1948.

Witness:

ALASKA INDUSTRIAL
BOARD for

HENRY A. BENSON,
Chairman.

By JOHN P. RUNDALL.

The undersigned certifies that as an employee of the Alaska Industrial Board and the Territorial Department of Labor, he served the foregoing notice on the parties hereinafter mentioned, at the time set opposite their respective names, by depositing a copy of said notice together with a copy of the application mentioned in a sealed envelope in the United States mail, with postage thereon fully prepaid, and addressed to said parties at their last known places of business or residence by registered mail, as follows, to wit:

Name of Parties Served—

Registry Number—

Date—

ALASKA PACKERS ASSN.,

c/o Morrell P. Totten & Co.,

618 Second Avenue,

Seattle 4, Washington,

(2 copies).

10/19/48.

.....

Signature.

JOHN P. RUNDALL.

EXHIBIT I

[See item 4 of the stipulation filed April 6, 1950, in the Court of Appeals set out on page 45 of this printed record.]

State of Washington,
County of King—ss.

I, F. P. Phillips, being first duly sworn on oath, depose and state that I was Superintendent of the South Naknek Cannery, Alaska, of the Alaska Packers Association, for the 1947 summer season and was actually in charge of all personnel, supplies, and operations, and that I have exact knowledge of all supplies, equipment, and floating equip-

ment used in the aforesaid cannery operations. I also hereby state that I personally know Mr. Alfred J. Peterson.

I wish to state that Mr. Alfred J. Peterson was employed by the Alaska Packers Association at the South Naknek Cannery as a Deck Hand during the Season, 1947. Mr. Peterson was first employed in 1947 on April 28th, and sailed as a Deck Hand on the M/V "Brant" on May 1st, from our Semiahmoo Cannery at Blaine, Washington. Captain Phillip Peterson, brother to Alfred J. Peterson, was Captain of the M/V "Brant." According to the official Log of the M/V "Brant," Alfred J. Peterson was transferred to the M/V "Rail" as a Deck Hand on June 19, 1947. To the best of my knowledge, the duties of Alfred J. Peterson were wholly confined to the respective vessels he worked on, and at no time did he perform any work ashore. The sack of coal that Mr. Peterson alleges he was carrying and which he also alleges injured his back was for use in the galley stove. Said sack of coal was lowered by dock employees to the deck of the M/V "Rail" from which landing place Mr. Peterson's duty would be to transport it to the galley.

To all the foregoing I hereby state that this is a true and correct statement to the best of my knowledge.

Date: 1/6/49.

/s/ F. P. PHILLIPS,

Superintendent, Naknek
Station.

Subscribed and sworn to before me at Seattle, Washington, this 6 day of January, 1949.

[Seal] /s/ A. E. McBREEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy Received, Roden. [23]

State of Washington,
County of King—ss.

I, F. P. Phillips, being first duly sworn on oath, depose and state that I was Superintendent of the South Naknek Cannery, Alaska, of the Alaska Packers Association, for the 1947 summer season and was actually in charge of all personnel, supplies, and operations, and that I have exact knowledge of all supplies, equipment, and floating equipment used in the aforesaid cannery operations. I also hereby state that I personally know Mr. Alfred J. Peterson.

I wish to state that Mr. Alfred J. Peterson was a Deck Hand on the M/V "Rail" during the summer fishing season of 1947, employed under the terms and conditions of the 1947, Alaska Fishermen's Union Bristol Bay Supplementary Agreement. The M/V "Rail" was used as a "Monkey Boat" servicing and towing fishing boats of the Alaska Packers Association at the Mouth of the Naknek River. The fishing boats were towed to our stationary marine receiving station named the

“Pearl” which was anchored at the Mouth of the Naknek River. The M/V “Rail,” Official Registration No. 226346, is a wooden vessel of 44.8 Feet in Length, 13.2 Feet in Width, 5.25 Feet in Depth, with a gross tonnage of 20.84, and a net of 9 tons. This vessel contains a 70 H.P. Atlas Diesel engine for motive power. I further wish to state that upon examination of the official Pilot House Log Book of the M/V “Rail,” which is inscribed in the handwriting of the Captain, Birger Nelsen, the only entry on July 10, 1947, is as follows:

3:20 Hooking on to fish boats at NN dock—
towed 9 to (M) Stiff SW Wind.

There is no reference to an injury to a crew member on that date or on any other date. Upon examination of Dr. Pickett’s official Medical Journal for the year 1947, at South Naknek Cannery, there is no mention of, or reference to, on July 10, 1947, or any other day, any injury such as alleged by Mr. Alfred J. Peterson, with the exception of July 9, 1947, when he went to Dr. Pickett at the hospital for head and chest cold, pleurisy across kidney, and the Doctor prescribed as follows:

Expectorant Mix—zl hr., APC; Browns—2
every 3 hrs., Chloroform Liniment. [24]

Date: Dec. 1-48.

/s/ F. P. PHILLIPS,
Superintendent Naknek
Station.

Subscribed and sworn to before me at Seattle,
Washington, this 1 day of December, 1948.

[Seal] /s/ A. E. McBREEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy received, Roden. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Rule 73 (b)

Notice is hereby given that the Alaska Industrial Board and Alfred J. Peterson, defendants above named, hereby appeal to the Circuit Court for the Ninth Circuit from the final judgment entered in this action on January 26, 1950.

J. GERALD WILLIAMS,

HENRY RODEN and

WILLIAM L. PAUL, JR.,

Attorneys for Defendants-
Appellants.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

[Endorsed]: Filed Feb. 21, 1950. [26]

[Title of District Court and Cause.]

COST BOND ON APPEAL OF DEFENDANT
PETERSON

Know All Men by These Presents, That we, Alfred J. Peterson, as principle, and S. M. Kennedy and Mrs. G. R. Kennedy, as sureties, are held and firmly bound unto Alaska Packers Association in the full and just sum of \$250.00, to be paid to the said Alaska Packers Association certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 20th day of February, 1950.

Whereas, lately at a trial in a suit pending in said Court, between Alaska Packers Association and Alaska Industrial Board and Alfred J. Peterson a judgment was rendered against the said Alaska Industrial Board and Alfred J. Peterson and the said Alaska Packers Association having obtained a final judgment thereon on January 26, 1950, and the said defendants having given notice of appeal therefrom to reverse the judgment in said suit.

Now, Therefore, the Condition of the above obligation in such, that if the said Alfred J. Peterson shall prosecute said appeal to effect, and answer all damages and costs if said appeal shall fail, then

the above obligation to be void; else to remain in full force and virtue.

ALFRED J. PETERSON.

By /s/ WILLIAM L. PAUL, JR.,

His attorney in fact.

(L.S.)

/s/ S. M. KENNEDY, (L.S.)

/s/ MRS. G. R. KENNEDY. (L.S.)

[Endorsed]: Filed Mar. 15, 1950. [27]

United States of America,
Territory of Alaska—ss.

Mrs. G. R. Kennedy and S. M. Kennedy being first duly sworn each for himself, and not one for the other, deposes and says: That I am a resident of the Territory of Alaska; that I am one of the sureties who signed and sealed the foregoing bond; that I am not a counselor or attorney at law; that I am not a marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that I am worth the sum of \$250.00 over and above all my debts and liabilities and exclusive of property exempt from execution.

/s/ MRS. G. R. KENNEDY,

/s/ S. M. KENNEDY.

Subscribed and sworn to before me this February 20th, 1950, at Juneau, Alaska.

[Seal] /s/ WILLIAM L. PAUL, JR.,
Notary Public for Alaska.

My Commission expires Jan. 19, 1952. [28]

[Title of District Court and Cause.]

STATEMENT OF POINTS

This case does not fall within the jurisdiction of admiralty over which the judicial power of the United States was extended by Article III, Section 2, of the Constitution; but falls within the local jurisdiction.

J. GERALD WILLIAMS,
HENRY RODEN and
WILLIAM L. PAUL, JR.,
Attorneys for appellants.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

Copy received.

[Endorsed]: Filed Feb. 21, 1950. [29]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
BY DEFENDANTS

To the Clerk of the Above-Entitled Court:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Circuit Court for the Ninth Circuit, with reference to the notice of appeal heretofore filed by defendants-appellants in the above cause, and to include in said transcript of record the following documents, or certified copies thereof, to wit:

1. Complaint filed April 29, 1949, with exhibit of Board Decision and Award only.
2. Answer of Alfred J. Peterson filed June 21, 1949.
3. Opinion of Court filed January 25, 1950.
4. Final Judgment signed January 26, 1950.
5. Exhibits from Board file introduced into evidence: a. Application for adjustment of claim of Alfred J. Peterson with only his affidavit of September 25, 1948; b. Affidavits of F. P. Phillips of December 1, 1948, and of January 6, 1949.
6. Notice of appeal filed February 20, 1950.
7. Defendant Peterson's Cost Bond on Appeal.
8. Appellants' Statement of Points.

9. This designation.

J. GERALD WILLIAMS,
HENRY RODEN and
WILLIAM L. PAUL, JR.,
Appellants Attorneys.

By /s/ WILLIAM L. PAUL, JR.,
Of Counsel.

Copy received.

[Endorsed]: Filed Feb. 21, 1950. [30]

CERTIFICATE

United States of America,
District of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 31 pages of typewritten matter, numbered from 1 to 30, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of the Appellant on file herein and made a part hereof, in Cause No. 6084-A, wherein the Alaska Industrial Board et al and Alfred J. Peterson is Defendant-Appellant and Alaska Packers Association, is Plaintiff-Appellee, as the same appears of record and on file in my office; that said record is by virtue of an appeal and Citation issued in this

cause and the return thereof in accordance therewith.

And I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to \$19 Dollars has been paid to me by Counsel for appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 16th day of March, 1950.

J. W. LEIVERS,
Clerk of District Court.

[Seal] By /s/ P. D. E. McIVER,
Deputy.

[Endorsed]: No. 12512. United States Court of Appeals for the Ninth Circuit. Alaska Industrial Board and Alfred J. Peterson, Appellants, vs. Alaska Packers Association, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed March 27, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12512

ALASKA INDUSTRIAL BOARD and ALFRED
PETERSON,

Appellants,

vs.

ALASKA PACKERS ASSOCIATION, a Cor-
poration,

Appellee.

STIPULATION

The parties hereto, by their respective counsel, stipulate that the following enumerated parts of the record in this cause are material to the consideration of this appeal and those parts only should be printed, to wit:

1. Complaint filed April 29, 1949;
2. Opinion of Court, filed January 25, 1950;
3. Final Judgment signed January 26, 1950;
4. Application for Adjustment of Claim of Alfred Peterson and the material portions of his affidavit which it is agreed contain the following facts:

On or about July 10, 1947, Alfred Peterson was employed as a deckhand on the monkey boat "Rail." His duties on this monkey boat were to assist in towing fishing boats and moving scows; that on or about July 10th, while

the vessel was at the Naknek dock in the navigable waters of Bristol Bay, he was carrying a sack of coal weighing two hundred pounds from the bow of the boat to the stern, going through a narrow passage and wrenched and strained his back. He subsequently was admitted to the United States Marine Hospital at Seattle, Washington, on August 11, 1947, and was discharged on September 11, 1947.

5. Affidavits of F. P. Phillips, dated December 1, 1948, and affidavit of F. P. Phillips dated January 6, 1949.

6. Notice of Appeal filed February 20, 1950;

7. Defendant Peterson's Cost Bond on Appeal;

8. Appellant's Statement of Point; and

9. This designation.

10. Clerk's Certificate.

RAY E. JACKSON,

HENRY RODEN,

Attorneys for Appellant
Peterson.

/s/ J. GERALD WILLIAMS,
Attorney General of Alaska.

/s/ R. BOOCHEVER,
Of Attorneys for Appellee.

[Endorsed]: Filed April 6, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT RELIED
ON BY APPELLANTS

On this appeal Appellants raise but one point: Whether the Alaska Industrial Board erred when it awarded compensation to Appellant Peterson under the Alaska Workmen's Compensation Act, a local statute, for accidental injuries sustained by him arising out of and in the course of his employment by Appellee as a deckhand on its small power boat used in connection with its cannery operations in Bristol Bay, Alaska.

The District Court for the First Division of the Territory of Alaska reversed the said Board, holding that under the facts here presented, relief could not be granted under the local statute and that the injured workman must resort to admiralty for relief.

RAY E. JACKSON,

HENRY RODEN,

Attorneys for Appellant
Peterson.

/s/ J. GERALD WILLIAMS,

Attorney General, Territory
of Alaska.

Copy received.

[Endorsed]: Filed April 6, 1950.

